IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. [redacted] 28

LOUIS KATCHEN,
Petitioner,

VS.

HYMAN D. LANDY, Trustee in Bankruptcy,
Respondent.

In the Matter of
KATCHEN'S BONUS CORNER, INC., Bankrupt

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT B. ROTTMAN
SOLOMON GIRSH
1212 University Building
Denver, Colorado 80202
Attorneys for Respondent

Ray F. Frey Co., Denver, Colo.

INDEX

AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 742

LOUIS KATCHEN,

Petitioner,

vs.

HYMAN D. LANDY, Trustee in Bankruptcy,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent prays that the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on September 9, 1964, be denied.

STATUTES INVOLVED

The statutory provisions involved are the following sections of the Bankruptcy Act: 2a, 11 U.S.C.A. 11; 2a(2), 11 U.S.C.A. 11(2); 2a(7), 11 U.S.C.A. 11(7); 2a(15), 11 U.S.C.A. (15); 57g, 11 U.S.C.A. 93(g); 60a, 11 U.S.C.A. 96(a); 60b, 11 U.S.C.A. 96(b); and 68, 11 U.S.C.A. 108. They are printed in Appendix A.

REASONS FOR DENYING THE WRIT

1. As is expressly stated in Rule 19 of the Supreme Court Rules, a review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Hence, as in the instant case, where there are no conflicting decisions in other Circuits and where there are no important questions of Federal law involved, a decision of a Circuit Court of Appeals is final, and a writ of certiorari should not be granted.

2. Contrary to the assertions of Petitioner, the decision of the court below is not in conflict with *Gill vs. Phillips*, 5th Cir., 337 F.2d 258, nor with *Avery vs. Davis*, 5th Cir., 192 F.2d 255. The *Gill* case, which was expressly determined upon the complex facts involved therein, involved an arrangement proceeding under Chapter XI of the Bankruptcy Act which culminated in bankruptcy, wherein Gill took certain action during the pendency of the arrangement and filed certain claims therein. In considering the filing of proofs of claim as constituting consent to the jurisdiction of the Referee, the court considered the case of *Avery vs. Davis*. The court found, however, that two of the claims filed in the *Gill* case were apparently based on the same financial transaction as the counterclaim, and, therefore, the matter of jurisdiction could not be disposed of simply by reference to the *Avery* case. The court, after reviewing the peculiar circumstances involved in the *Gill* case, concluded by stating:

> "In light of the ambiguous nature of the Trustee's pleadings, the absence of any assertion by the Trustee that the cause of action in his counterclaim arose out of the same transaction as Proof of Claim No. 48, the uncertainty as to the breadth of the *Avery* decision and the absence of argument as to its applicability, and the fact that Gill's Proof of Claim No. 48 was filed prior to the adjudicaton in bankruptcy, we do not feel justified in finding that Gill consented to the exercise

of summary jurisdiction. However, we do not intend our decision in this case to be interpreted to be as either an acceptance or repudiation of the 'same transaction' theory by this Circuit. We wish to reserve a decision on that question for a case that brings the issue squarely into focus."

In the *Gill* case, the court took the position that the *Avery* case is not clear where the claim and counterclaim are based on the same transaction, and that although the claim and counterclaim in *Avery* arose out of unrelated transactions, that distinction "was not the articulated rationale of the decision." The *Avery* case was based solely upon a finding that the claimant therein was in adverse possession of the property in question prior to bankruptcy under an adverse right of claim, rather than by a mere colorable claim, and, therefore, the rights to said property could not be summarily adjudicated. The *Avery* case does not consider or pass upon the issues or law as are involved in the present case, and hence cannot be in conflict therewith.

Contrary to Petitioner's assertion that other Circuits are in effect in conflict with the Tenth Circuit, citing *Continental Casualty Company vs. White*, 4th Cir., 269 F.2d 213; *In re Solar Manufacturing Corp.*, 3d Cir., 200 F.2d 327; *Peter vs. Lines*, 9th Cir., 275 F.2d 919, each of these cases in fact support the decision in the present case. Each of said cases dealt with a counterclaim arising out of the same transaction as that from which the proof of claim arose. Each of said cases was decided solely on the facts and issues presented and upon the principle that the filing of a proof of claim constitutes implied consent to the Bankruptcy Court's summary jurisdiction of a counterclaim arising out of the same transaction as the claim. *Peter vs. Lines* noted that it joined five other Circuits in adopting this principle of law. The mere fact that the Tenth Circuit has applied the principle of implied consent to counterclaims

involving preferences in no way conflicts with the authority heretofore established in the other Circuits.

Petitioner asserts that the case of *Majestic Radio vs. Dwyer*, 7th Cir., 227 F.2d 152, is in conflict with the decision of the Tenth Circuit. In the *Majestic* case, the claimant therein, a former director of the bankrupt corporation, filed a claim for goods sold the bankrupt. The Trustee asserted a counterclaim based upon a breach of claimant's fiduciary duty as a director. The Seventh Circuit found that the claim and counterclaim arose out of a different transaction, and further found that the counterclaim did not involve a preference or a fraudulent or voidable transfer, and therefore the filing of a proof of claim did not constitute implied consent to the summary jurisdiction of the Bankruptcy Court. The decision in the *Majestic* case is entirely consistent with the decision of the Tenth Circuit, and is in no way in conflict therewith.

The consistency and lack of conflict is demonstrated by the fact that the Tenth Circuit, in the instant case, upheld the jurisdiction of the Referee only as to the three claims involving preferences, and reversed the Referee and District Court as to the portion of the judgment for the non-preference claim relating to the purchase price of stock in the corporation, finding no summary jurisdiction in connection therewith.

3. The constitutional right to a jury trial has not been denied the Petitioner.

In filing proofs of claim in the Bankruptcy Court, Petitioner consented to the summary jurisdiction of the Bankruptcy Court, and thereby waived any right to a plenary action together with any right to a jury trial on the issues involved in such claims. He cannot thereafter complain of the Court's power to render a judgment against him on proper counterclaims asserted by the Trustee for the re-

covery of preferences. As Judge Seth, in his concurring opinion, stated:

> "The appellant has waived by the filing of his claims in this action any right to object to the nature or the scope of the summary hearing insofar as it may cover claims and preferences. Such subjects are clearly within the substantive bankruptcy law, and he must abide by the decision of the Court."

The Bankruptcy Court is a court of equity empowered under Section 2a(15) of the Bankruptcy Act, 11 U.S.C.A. a(15), to make such orders, issue such process and enter such judgments as may be necessary for the enforcement of the provisions of said Act. Petitioner was in no way prejudiced by the Referee's determination of the Petitioner's claims and counterclaims thereto and in no way would have benefited from a plenary suit in this case. As stated by Judge Seth:

> "Against this background of business dealings, family relations, and participation in the management of the bankrupt, the appellant filed his claims . . . . Appellant, we must also assume, had knowledge that his claim would be heard before the bankruptcy court, and the scope of the hearing would include those subjects required by 11 U.S.C.A. Sections 96 and 93(g). This scope and issues of the summary hearing necessarily included, and the referee was required by law, to determine whether or not the disbursements of corporate funds made by the appellant to the banks in partial payment of the notes on which his signature appeared constituted a preference. This is clearly a part of the substantive law of bankruptcy. The hearing necessarily had to include sufficient testimony and evidence in order that the referee could decide whether or not there had been a preference to appellant. Such a determination in any case of this character would be binding by res judicata or by equitable estoppel in any subsequent plenary action. The plenary suit would thus be reduced to a mere formality except as to the dollar amount of the preference, and perhaps not even that."

The decision of the Tenth Circuit gives full expression to the long-recognized doctrine stated in *Alexander vs. Hillman*, 296 U.S. 222, 80 L.Ed. 192, and approved in numerous cases thereafter that equity once invoked will render full and complete relief as between the petitioning parties to the Court.

4. The same questions are not in fact presented in the instant case as were presented in *Inter-State National Bank vs. Luther*, 10th Cir., 221 F.2d 382.

Although the majority opinion in the instant case relied upon its prior *Inter-State* decision, the effect of the decision in the instant case has been to limit the summary jurisdiction to specific instances; namely, to those wherein there is involved a preference, setoff, voidable lien or fraudulent transfer. Counterclaims wholly unrelated to the creditor's claim are expressly excluded from the summary jurisdiction of the Bankruptcy Court. The decision in the instant case in effect modifies and limits the nature and scope of the *Inter-State* case. Accordingly, there is no compelling reason for the granting of certiorari in the instant case as there may have been with regard to the *Inter-State* case.

It has been held that the Supreme Court will grant a writ of certiorari sparingly and only in extraordinary cases of peculiar gravity and general importance. The instant case is not of such general importance to the public, nor is it of such peculiar gravity as to warrant granting of certiorari.

5. Contrary to the assertion of Petitioner, there is abundant statutory authority granting the Bankruptcy Court summary jurisdiction of a counterclaim based on a preference against a claimant, whether or not the counterclaim arose out of the same transaction as the claim.

The Bankruptcy Act establishes courts of bankruptcy,

as defined therein, and specifically invests them within their respective territorial limits with such jurisdiction at law or equity as will enable them to exercise original jurisdiction in proceedings under the Act for purposes stated in the Act. Bankruptcy Act, Section 2a, 11 U.S.C.A. 11.

The Bankruptcy Act also contains a blanket jurisdictional provision empowering the Bankruptcy Court to make such orders, issue such process and such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Act. Bankruptcy Act, Section 2a(15), 11 U.S.C.A. (15).

The Federal District Court, as a court of bankruptcy, has general jurisdiction over controversies relating to the estate in bankruptcy. Bankruptcy Act, Section 2a(7), 11 U.S.C.A. 11(7). It can therefore determine any controversies in that field as against one who invokes its determination or consents to the exercise of jurisdiction. Such "consent" to jurisdiction can be conferred by one who voluntarily seeks determination of rights in the Bankruptcy Court as by filing a proof of claim. The Bankruptcy Court has exclusive and summary jurisdiction to allow or disallow claims against the bankrupt estate. Bankruptcy Act, Section 2a(2), 11 U.S.C.A. 11(2). In the exercise of that jurisdiction, it "sits as a court of equity" clothed with jurisdiction "to sift the circumstances surrounding any claim, to see that injustice or unfairness is not done in administration of the bankrupt estate." *Pepper v. Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281.

Section 57g of the Bankruptcy Act, 11 U.S.C.A. 93(g) provides that claims of creditors who have received or acquired void or voidable preferences are not allowable unless such creditors shall surrender such preferences. Section 60a, 11 U.S.C.A. 96(a), defines a void or voidable preference, and Section 60b, 11 U.S.C.A. 96(b) provides that such preferences may be voided by the Trustee.

As Judge Murrah stated in the *Inter-State* decision:

> "It is only a short and to us a perfectly valid jurisdictional step from the summary power to adjudicate a voidable preference and summary power to grant affirmative relief thereon, especially when the authorized adjudication has a binding effect in a plenary suit. Certainly the exercise of this affirmative equitable jurisdiction is within the substantive provision of the Bankruptcy Act providing for the disallowance of claims tainted with a preference."

The purpose of a plenary suit in bankruptcy administration is to seek recovery from one who has not voluntarily submitted himself to the jurisdiction of the Bankruptcy Court. Such a suit is not necessary against one who has of his own volition submitted his claims in connection with a certain transaction to the determination of the Bankruptcy Court. The filing of such a claim operates to invoke the Court's concurrent jurisdiction with the State courts under Section 60b to adjudicate and recover any voidable preference.

As an incident to its powers to disallow claims, the Bankruptcy Court has jurisdiction to determine issues raised by the Trustee under Section 57g, and, by the same reasoning, to entertain a counterclaim raised by Section 68 of the Bankruptcy Act, 11 U.S.C.A. 108, authorized by Rule 13 of the Federal Rules of Civil Procedure, and based on the Section 57g issue. Rule 13 would seem to make it incumbent upon the Trustee to allege any counterclaim which falls within Rule 13a and to give him the right to allege any counterclaim which is included within Rule 13b.

Section 2a(7) of the Bankruptcy Act, referred to by Petitioner and upon which objection to summary jurisdiction is claimed to have been made, has no applicability in the instant case. As stated in *Continental Casualty Company vs. White*, 4th Cir., 269 F.2d 213:

> "The Section quoted above was enacted to clarify and limit the effect of the *Cline* case *(Cline vs. Kaplan,*

323 U.S. 97, 65 S.Ct. 155, 89 L.Ed. 97). We are of the opinion that this amendment was intended by Congress to apply to situations similar to *Cline vs. Kaplan* where the adverse party is involuntarily brought into court by preemptory process such as a turnover, and was not meant to diminish the jurisdiction of the bankruptcy court where the creditor has come into court voluntarily by filing a claim against the estate. There is nothing to indicate that the statute was designed to authorize a party to object to the summary jurisdiction where he has come into court on his own motion seeking relief."

6. There is no important question of Federal law involved in the instant case which should be settled by this Court.

When Petitioner appealed to the Circuit Court from the decision of the District Court and the Referee in Bankruptcy, there were four claims upon which judgment totaling $44,899.00 had been rendered against Petitioner, to-wit:

(1) Preference by reason of payment by the bankrupt to the American National Bank on October 13, 1960, in the sum of $14,599.00.

(2) Preference by reason of payment by the bankrupt to said American National Bank on November 18, 1960, in the sum of $10,137.50.

(3) Preference by reason of payment by the bankrupt to the North Denver Bank, on September 13, 1960, of $10,162.50.

(4) Amount agreed to be paid by Petitioner for the capital stock of the corporation of $10,000.00.

When the Tenth Circuit Court of Appeals passed upon the decision of the District Court, it affirmed the judgment of the District Court as to the first three claims; namely, those relating to preferences, but declined to do so as to the fourth claim, asserting that it was not within the summary

jurisdiction of the Bankruptcy Court. As a result, the judgment against Petitioner was confined to the counterclaims of the Trustee which arose out of preferences.

As stated in *Peter vs. Lines*, at least six other Circuits have heretofore held that a claimant invokes the jurisdiction of the Bankruptcy Court to render an affirmative judgment in summary proceedings on a counterclaim of the Trustee arising out of the same transaction.

Hence, the only aspect of the decision of the Circuit Court which has not been frequently considered and consistently determined is that relating to the claim of preference resulting from payment to the North Denver Bank of $10,162.50.

General Order 37 of the Bankruptcy Act sets forth that "in proceedings under the Bankruptcy Act, the Rules of Civil Procedure for the District Courts of the United States shall, insofar as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be." Under Rule 13 of the Federal Rules of Civil Procedure, subdivision a, relating to compulsory counterclaims, requires the assertion of a counterclaim as to any claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Subdivision b, relating to permissive counterclaims, states that "a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence which is the subject matter of the opposing party's claim."

The preferences involved in the payments to the American National Bank were included in the counterclaim filed by the Trustee as required under Rule 13a of the Federal Rules of Civil Procedure, inasmuch as they arose out of the same transaction which was the subject matter of one of Petitioner's claims in the Bankruptcy Court. Under the provisions of the Bankruptcy Act, Trustee had no choice in the matter. If he did not incorporate the claim arising out

of the payments to the American National Bank in his counterclaim, he would have been precluded from asserting this claim in any other proceeding.

The courts have heretofore had no hesitancy in permitting the Bankruptcy Court to exercise summary jurisdiction in this type of situation. The courts, as did the Tenth Circuit in the instant case, should have no hesitancy to exercise summary jurisdiction under Rule 13b over a permissive counterclaim relating to a preference such as the payment to the North Denver Bank, a counterclaim involving the same issues as were involved in the compulsory counterclaims relating to the American National Bank payments.

The propriety of extending the summary jurisdiction of the Bankruptcy Court to the preference involved in the payment to the North Denver Bank was, no doubt, of importance to Petitioner. However, the granting of a writ of certiorari requires more. As stated by Justice Taft in the case of *Layne vs. Bowler Corporation*, 261 U.S. 387, 67 L.Ed. 712:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

The present case, Respondent submits comes under neither heading.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT B. ROTTMAN
SOLOMON GIRSH
1212 University Building
Denver, Colorado 80202
Attorneys for Respondent

APPENDIX A

STATUTES

Section 2a of the Bankruptcy Act, 11 U.S.C.A. 11:

"The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—"

Section 2a(2) of the Bankruptcy Act, 11 U.S.C.A. 11(2):

"Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;"

Section 2a(7) of the Bankruptcy Act, 11 U.S.C.A. 11(7):

"Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an

answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

Section 2a(15) of the Bankruptcy Act, 11 U.S.C.A. (15):

"Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the judge only;"

Section 57g of the Bankruptcy Act, 11 U.S.C.A. 93(g):

"The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

Section 60a of the Bankruptcy Act, 11 U.S.C.A. 96(a):

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Section 60b of the Bankruptcy Act, 11 U.S.C.A. 96(b):

"Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his

agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

Section 68 of the Bankruptcy Act, 11 U.S.C.A. 108:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."